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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
225836	REPORT	INTERAGENCY REPORT ON THE LAW OF THE SEA	13	6/11/1982	B1

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DEPARTMENT OF STATE

Washington, D.C. 20520

June 11, 1982

~~CONFIDENTIAL~~

TO: OES - Mr. Malone

FROM: OES/O - Theodore G. Kronmiller

SUBJECT: Reciprocating States and the Law of the Sea

This memorandum supplements a cable (London 12826- attached) sent earlier today. In meetings with the French, British and the Germans over these two days the following became clear:

1. A full-blown RSA along the lines previously contemplated cannot be achieved by June 21. The Germans and the French regard such an agreement as inherently prejudicial to their LOS options because they would be led into mutual recognition of mine site authorizations which would be impermissible under the LOS Treaty. Further, they do not think that there is time to respond to any initiatives by the 21st. The UK has a need for a European partner in such an Agreement, but does not see an inherent problem with the Agreement as such.

2. A full-blown RSA could be achieved with the UK within six weeks, possibly even without other European participation. It would require, probably, intervention at the highest level to persuade the UK to go bilateral. Because of the FRG and French position on the substance of the full-blown RSA, conclusion of the Agreement with them could not be achieved within this time period.

3. A full-blown RSA could conceivably be concluded later in the year. For France and the FRG, this would depend on decisions not to sign the LOS Treaty. For France, such a decision is exceedingly unlikely and for Germany there is little greater possibility. Naturally, a decision by the FRG to sign the RSA later in the year would aid in gaining UK participation.

4. A limited RSA, that is, one not providing a mechanism for mutual recognition of mine sites, could not be achieved by June 21. While such an Agreement appears acceptable to all parties in substance, there is insufficient time for final policy decisions to be made by June 21.

5. A limited RSA could be achieved within six weeks. For the French this would depend on US agreement not to make commitments before a point late in the year which would have the effect of (a) precluding mutual designation as reciprocating states (e.g., certification of an applicant for licensing by the US) or (b) establishing reciprocity between the United States and any other country. This would protect the French from isolation while they make their LOS decision and would enhance their ability to engineer European unity in favor of signature of the LOS Treaty. For the UK and FRG, a period of interaction with the US could much shorter (perhaps 30 to 60 days, though this is a guess). They favor this approach as non-prejudicial to their LOS options and as contributing to a favorable political climate with the US. They also believe that this Agreement, however limited, would benefit the industry (though the US delegation tends to disagree).

What the US would gain from a limited RSA would be the avoidance of political isolation for a very limited time, i.e., until the parties made their LOS decisions or simply decided to participate in the PIP process. What the United Staes would lose would be its ability to undertake immediate or (in the future) strong diplomatic efforts to draw the Europeans into a full RSA. (It may be argued that any agreement between the US and any of its allies would assist us in bringing them out of the LOS treaty with us, should we decide not to sign it.)

Concerning a decision by the President not to sign the LOS Treaty, the following was gleaned from the discussions:

1. An announcement of a Presidential decision prior to conclusion of interim seabeds arrangements would diminish or preclude our ability to achieve such arrangements.

2. Several members of the US delegation maintain that mere publicity of such a decision, without a formal announcement, would have the same effect.

3. A decision on the LOS Treaty by the UK could be profoundly influenced by Presidential intervention.

4. A decision by France to sign the Treaty, though not to ratifiy, appears to be foregone.

5. A decision by the FRG in favor of signature appears highly probable in view of the recent tendencies of pro treaty Foreign Ministry forces. However, a US effort to produce a different result could possibly succeed if made at the highest levels.

Comment:

Though the FRG, France and UK each expressed concern over the June 21 date, discussion of the matter seemed to assuage their fears. They dropped their objections when convinced that the date was not necessarily prejudicial to their interests in possible future reciprocal arrangements with the US.

Attachment:

London 12826

~~CONFIDENTIAL~~ SSA742

PAGE 01 LONDON 12828 101534Z
ACTION OES-09

INFO	OCT-00	COPY-01	ADS-00	AID-07	INR-10	EUR-12	SS-10
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~~C O N F I D E N T I A L~~ LONDON 12828

E.O. 12065: RDS-1 6/10/12 (STREATOR, E.J.) OR-M
TAGS: EMIN, PLOS
SUBJECT: SEABED MINING: RECIPROCATING STATES NEGOTIATIONS JUNE 9-10, 1982; USDEL REPORT

REF: (A) STATE 158924, (B) STATE 152230

1. ~~C~~ - ENTIRE TEXT.

2. U.S. LAW OF THE SEA (LOS) DELEGATION, MET IN LONDON WITH UK, FRG AND FRENCH DELS ON INTERIM ARRANGEMENTS FOR SEABED MINING.

3. DISCUSSION ON JUNE 9 FOCUSED ON THE DEVELOPMENT OF A SEABED AGREEMENT WHICH WOULD FACILITATE THE RESOLUTION OF

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OES

S/S-O

~~CONFIDENTIAL~~

CONFLICTS AMONG PENDING MINE SITE APPLICATIONS AND PROVIDE FOR FUTURE CONSULTATIONS AMONG THE STATES IN WHICH PRE-ENACTMENT EXPLORER (PEE) APPLICATIONS HAVE BEEN FILED. IN ORDER TO ENSURE THAT OPTIONS RELATING TO THE LOS CONVENTION OR AN ALTERNATIVE REGIME WERE NOT PREJUDICED, THE FRG AND FRANCE INSISTED THAT THE AGREEMENT NOT RPT NOT PROVIDE FOR A MECHANISM BY WHICH RECOGNITION OF MINE SITES WOULD BE EFFECTED. IT WAS, THEREFORE, AGREED AMONG THE FOUR THAT RECIPROCAL RECOGNITION BE DEALT WITH, IF AT ALL, BY FUTURE AGREEMENT.

4. AFTER SOME DISCUSSION, THE U.S. JUNE 21 DATE FOR BEGINNING OF PROCESSING OF APPLICATIONS WAS REGARDED AS NON-PREJUDICIAL AND OBJECTION TO IT WAS DROPPED.

5. FRANCE AND FRG DELS INDICATED THAT THERE WAS LITTLE OR NO PROSPECT THEY WOULD SIGN ANY AGREEMENT PRIOR TO JULY. IT APPEARS THAT FRANCE MAY BE ENGAGED IN AN EFFORT TO PREVENT; BY DELAY, ANY AGREEMENT WHATEVER.

6. UK VOLUNTEERED TO TWO MEMBERS OF U.S. DEL IN SEPARATE CONVERSATIONS THAT, FAILING INTERIM MULTI-LATERAL AGREEMENT, THEY WOULD EXAMINE THE OPTION OF INTERIM BILATERAL ARRANGEMENTS BETWEEN UK AND U.S. UK REPS STATED THAT BILATERAL MIGHT BE BEST SOLUTION REALISTICALLY AVAILABLE. (NOTE: HEAD OF UK DEL INDICATED THAT THATCHER MIGHT DECIDE NOT TO SIGN THE TREATY UPON URGING BY REAGAN. THE UK HAS MADE NO DECISION EVEN AT STAFF LEVEL TO SIGN OR NOT SIGN LOS TREATY AND CLEARLY WANTS TO KEEP ITS OPTIONS OPEN ALTHOUGH ALL MINISTRIES BUT INDUSTRY ARE LIKELY TO RECOMMEND SIGNATURE.)

7. SPLIT BETWEEN FRG FOREIGN AND ECONOMIC MINISTRIES WAS

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PAGE 03 LONDON 12826 1015547

OBVIOUS. FON MIN WISHES TO DO NOTHING WHICH IS HOSTILE TO G-77 AND WISHES TO SIGN TREATY AT EARLIEST POSSIBLE TIME. RSA IS VIEWED AS DANGER TO FRG SIGNATURE OF TREATY. ECONOMIC MINISTRY WAS PESSIMISTIC THAT IT COULD OVERCOME FON MIN IN THIS REGARD.

8. FRENCH DEL STATED REPEATEDLY THAT THEY HAD MADE NO DECISION REGARDING SIGNATURE OF THE CONVENTION.

9. MORNING OF JUNE 10 UK SURFACED NEW DRAFT AGREEMENT. PREAMBLE REFLECTED U.S. PROPOSALS PER REF B, WITH MINOR AMENDMENTS. OBLIGATIONS INCLUDED: (1) CONSULTATIONS: (2) USE OF PREVIOUSLY AGREED SEABED MINING PEE APPLICA- S/S-O

~~TION PROCEDURES (WITH AMENDED DATES); AND (3) USE OF PRE-~~

VIOUSLY AGREED CONFLICT RESOLUTION PROCEDURES AND PRIN- S/S-O
CIPLES, IN EVENT THAT VOLUNTARY PROCEDURES FAIL AND RECIP-
ROCITY IS ESTABLISHED.

2

10. INTENSIVE NEGOTIATIONS PRODUCED FEW SUBSTANTIVE CHANGES TO DRAFT.

11. AT THIS TIME, STATUS OF NEW TEXT REMAINS UNCERTAIN. IT WAS TO BE SUBMITTED, HOWEVER, TO CAPITALS. END USDEL REPORT.LOUIS

S/S-O

LAW OF THE SEA CONVENTION

TALKING POINTS

-- It is the analysis of Western countries that the Law of the Sea Convention is central to their strategic, economic, and political interests; its successful implementation is sufficiently important to Canada that Canada hopes that the United States would consult with its allies before taking any final decision on whether or not to sign the Convention.

-- The United States should not assume that there is no longer any chance of bringing further change to the Convention.

-- The USA would draw considerable benefits from the Law of the Sea Convention, including the seabed mining regime, in light of amendments made at the eleventh session (ie. guaranteed seat on the Council for the USA, protection of preliminary investments providing guaranteed access to seabed resources and virtual control by USA companies of the first generation mine sites, and simplification of the procedures in seabed authority, etc.).

.../2

-- It would certainly not be possible for a state to choose which provisions it may benefit from as customary international law (as opposed to conventional law) while remaining outside the Law of the Sea Convention. The treaty was negotiated as a package and much of its various substantive provisions will apply only to states parties. It cannot be argued, for example, that provisions on transit passage in straits which are of great importance to the USA are customary international law; these are new rules of law which will apply only between states parties to the Law of the Sea Convention.

-- In broad terms, staying outside the Law of the Sea Convention would isolate the USA, deprive it of benefits from the Law of the Sea Convention, harm its relations with third world countries, without enabling the USA to achieve its objective of guaranteed access to seabed resources.

-- A mini-treaty is not a viable alternative since it cannot provide security of tenure to USA consortia

.../3

with respect to mine sites. Only the Law of the Sea Convention, together with the Preparatory Investment Protection (PIP) and the Conflict Resolution Memorandum proposed by Canada can provide the security of tenure essential to seabed miners. Canada's proposal concerning the settlement of overlapping seabed boundary claims provides an alternative to a mini-treaty, one of which is compatible with the Convention. Early response (e.g. from Japan) has been favourable.

DRAFT MEMORANDUM OF UNDERSTANDING

ON THE SETTLEMENT OF CONFLICTING CLAIMS

WITH RESPECT TO SEABED AREAS:

TALKING POINTS

-- In response to the resolution on Preparatory Investment Protection (PIP) adopted at the 11th Session of UNCLOS, and which requires potential certifying states (Canada is named as prospective certifying state) to resolve overlapping seabed area boundary claims before applications for pioneer status can be submitted to the Preparatory Commission (the precursor of the International Seabed Authority), Canada has prepared a Draft Memorandum of Understanding which would assist in this process. A copy of this Memorandum is attached to these talking points.

-- We are sending a copy of our Memorandum to all potential certifying states, ie. France, Japan, India, USSR, FRG, Belgium, the Netherlands, Italy, U.K. and USA.

-- Since all the potential certifying states are included, this will greatly assist in the settlement of overlapping claims.

-- Canada would suggest that all interested states meet to discuss our Memorandum and the resolution of competing claims as soon as possible and would suggest a United Nations city such as New York or Geneva or some other convenient capital.

-- If it would be helpful to the work, Canada would be prepared to Chair the first meeting (which could be held in a Canadian mission) but would suggest that the Chairman (and the local venue) rotate among the participants.

...2

-- Canada does not wish to take the lead on this exercise which should be very much a cooperative effort amongst all concerned countries.

-- As far as the relationship of this exercise to the "mini-treaty" is concerned, Canada does not subscribe to the creation of a regime outside of the Law of the Sea framework.

-- The Canadian proposal is directed to all countries with seabed mining interests and is designed to assist in the development of internationally agreed rules for the deep seabed in line with the Law of the Sea Convention.

-- Our proposals have the advantage of offering to bring all potential certifying states together, at the same time, to open the envelopes containing the coordinates for seabed areas.

-- The State Department must recognize the danger of publicizing the coordinates of four private consortia without knowing the claims of the other interested states (ie. France, Japan, USSR and India) and the potential that this gives for future competing claims to the same area.

-- Canada would welcome any comments on this initiative or the Draft Memorandum and we are naturally very open to suggestions and improvements.

D R A F T

MEMORANDUM OF UNDERSTANDING ON THE SETTLEMENT OF CONFLICTING CLAIMS WITH RESPECT TO SEABED AREAS

The Parties to this Memorandum of Understanding,

Bearing in mind the adoption of the Draft Convention on the Law of the Sea by the Third United Nations Conference on the Law of the Sea,

Bearing in mind the Draft Resolution governing preparatory investment in pioneer activities relating to polymetallic nodules and the Draft Resolution establishing the Preparatory Commission for the International Seabed Authority,

Recognizing that the Parties hereto are named in the Resolution governing preparatory investment as controlling or having an interest in potential pioneer investors engaged in activities relating to polymetallic nodules,

Recognizing in particular the requirement of the Draft Resolution governing preparatory investment to ensure that areas in respect of which applications are made to the Preparatory Commission do not overlap with one another,

...2

Desirous of resolving any such overlapping claims within the framework of the Draft Resolution governing preparatory investment,

Have reached the following Understanding:

SECTION I: Use of Terms

As used in this Memorandum:

(A) "Pioneer Investor", "Pioneer Activities" and "Pioneer Area" have the meanings assigned to those terms under the Resolution governing preparatory investment in pioneer activities relating to polymetallic nodules adopted by the Third United Nations Conference on the Law of the Sea hereinafter referred to as the "PIP Resolution";

(B) "Preparatory Commission" mean the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea as established by the Resolution on the establishment of the Commission adopted by the Third United Nations Conference on the Law of the Sea;

(C) "Conflicts" means the existence of two or more applications in which the pioneer areas applied for overlap in whole or part.

...3

SECTION 2: Initial Meeting

2.1 The Parties will meet in a mutually agreed location not later than ( ) for the purposes of:

(A) Notifying each other of the identity of each entity which has indicated its intention to apply for registration as a pioneer investor; and

(B) Opening, for the first time, the envelopes containing the coordinates of the areas which the entities referred to in (A) intend to submit to the Parties for registration by the Preparatory Commission.

2.2 Each area be given consideration for the purpose of Conflict Resolution only if the total area applied for is sufficiently large and of sufficient estimated commercial value to allow two mining operations in accordance with paragraph 3(A) of the PIP Resolution. Each entity is entitled to only one area.

SECTION 3: Identification of Conflicts and Notification

Each Party will identify the exact location of any conflicts and, not later than 30 days after the initial meeting, inform the other Party or Parties concerned by the conflict.

...4

SECTION 4: Conflict Resolution by Entities Concerned

4.1 Each Party will give the entities involved in conflicting claims with respect to seabed areas the opportunity to resolve any conflicts by voluntary procedures. To that end, the entities may, at any time, amend the designation of the area which they intend to apply for with a view to eliminate conflicts. The Parties will be informed of all such amendments.

4.2 The Parties will not apply to the Preparatory Commission for the registration of areas which are the object of conflicting claims until all existing conflicts are resolved.

SECTION 5: Assistance by Parties

If by ( ) the entities involved in a conflict have not resolved that conflict, the Parties will use their good offices to assist the entities to that end.

SECTION 6: Notification to the Preparatory Commission

In accordance with paragraph 5(A) of the PIP Resolution, the Parties will inform the Preparatory Commission of any efforts to resolve conflicts with respect to overlapping claims.

...5

SECTION 7: Settlement of Claims

If, despite assistance by the Parties as provided in Section 5, a conflict is not resolved by negotiation by March 1, 1983, the Parties undertake to submit all such claims to binding arbitration in accordance with UNCITRAL arbitration rules. Arbitration will commence not later than May 1, 1983, and will be carried out in accordance with paragraph 5(C) and (D) of the PIP Resolution, including consideration of the factors on which the Arbitral Tribunal is to base the award.

SECTION 8: Amendments

This Memorandum may be amended by consent of the Parties. Any amendment will take effect 30 days after it has been accepted by all the Parties.

SECTION 9:

9.1 The Parties will use their best endeavours to fulfil commitments under this Memorandum of Understanding.

SECTION 10: Effective Date

Done at , this day of , 1982, in the English, French, , , and languages

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each version being equally authentic.

For the Government of :

For the Government of :

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INQUIRY
MAGAZINE

DOUG BANDOW
Editor

file
COS

6/14/82

Bill:

Be aware, that this is the new line--let's negotiate and get a few concessions in September. You might also be amused by Leigh's oblique references to Keating and me; we were such troublemakers.

Cheers,

D

1320 G Street, S.E. • Washington, D.C. 20003 • (202) 547-2770

PAS 001H

Page Proofs
Foreign Affairs
JUN 26 1982
Leigh Ratiner

leigh so ratiner

11 pts #

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the law of the sea: a crossroads for american foreign policy

35 pts #

On April 30, the United States was the only Western industrialized country to vote against the final treaty adopted in New York by the United Nations Law of the Sea Conference. Venezuela, Turkey and Israel also voted no. The U.S.S.R. and most bloc countries abstained, as did a few highly industrialized Western nations. Most of the West including France and Japan joined the Third World and voted yes. Altogether, 130 nations voted to adopt the treaty and open it for signature.

The final treaty falls short of the goals sought by the Reagan Administration. It establishes a mixed economic system for the regulation and production of deep seabed minerals and, as a matter of principle, the Reagan Administration could not, consistent with its free enterprise philosphy, have done otherwise when the time came to vote.

Unfortunately, our strong and uncompromising defense of principle may have cost us a golden opportunity to convert the treaty into a better vehicle for commercial operators.

But that loss could be minor when compared with the prospect that the United States might now decide to exclude itself from a new global regulatory organization which may—sooner rather than later—count among its members all of our allies, the Third World and the socialist bloc. This new institution will safeguard the mining claims of our industrial competitors and reject rights claimed by American flag companies.

Moreover, if the United States stays out of the sea law treaty, and most major nations join it, we risk conflict over American assertions that we are entitled, without participating in the treaty, to rights embodied in the treaty related to navigational freedoms, ~~the~~ Exclusive Economic Zones, jurisdiction over our continental

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Leigh S. Ratiner was Deputy Chairman of the United States Delegation to the final negotiating session of the Third United Nations Conference on the Law of the Sea, while on leave of absence from the Washington law firm of Dickstein, Shapiro & Morin in which he is a partner. He had served at the Law of the Sea Conference prior to 1977 in three previous Administrations, as a senior advisor and negotiator on seabed mining, energy and national security issues.

shelf, fisheries, pollution control and the conduct of marine scientific research.

Should all this come to pass—and it seems likely it will—we will suffer a significant, long-term foreign policy setback with grave implications for United States influence in global economic and political affairs.

II

The Law of the Sea Treaty has been under negotiation since 1966, when the United States and U.S.S.R. agreed to consult all nations on the question of whether they would agree to a new global conference on the law of the sea. As initially envisaged, the aim of the conference would have been to fix the limit of the territorial sea at 12 miles and to provide for freedom of navigation through and over international straits which might be overlapped by the new 12-mile limit.

In 1968 the United Nations began to expand the as yet unwritten agenda of the Conference to include the issue of deep seabed mining in areas beyond national jurisdiction. By the time the Law of the Sea Conference was formally created in 1973, its agenda included essentially all uses of the oceans. Between 1973 and 1980 over 150 countries including the United States agreed on treaty texts on all but four points: boundary delimitation, which was settled in the summer of 1981; participation in the treaty by entities which are not sovereign states; the composition and functions of the Preparatory Commission to set up the International Seabed Authority; and provisions for the protection of investment in deep seabed mining activities prior to entry into force of the treaty. After ten sessions of the Conference and 14 years of negotiating effort, the new Administration in Washington sought in the final Conference session this spring to renegotiate essential elements of a package that already commanded widespread support and near consensus.

How did this come about? In March 1981, the new Reagan Administration began a much-needed, soul-searching review of the draft convention on the law of the sea. It was clear that notwithstanding the treaty's many potential benefits, its deep seabed mining provisions were anathema to some elements of the Reagan Administration; moreover, the treaty was considered unratifiable in the Senate. The U.S. policy review lasted more than a year.

The policy review process, like many conducted through interagency groups regardless of which Administration may be in

power, was essentially an adversarial process in which initially all documents were prepared for the purpose of reaching preconceived objectives and prejudicing an ultimate decision toward one or another of the adversaries. Pressure from the White House for the interagency group to reach consensus was intense and this produced even further, and in some cases devastating, compromise formulations describing fundamental issues in dispute. (As a result, at least one crucial point was destined to be ignored in the final decision-making process because of its obscurity, obfuscation and ambiguity.) Every effort was made by the Assistant Secretary of State who was in charge of this review to conduct a neutral and balanced process. The fact that he failed in this mission is not a reflection on his capabilities but rather on the interminable capacity of bureaucrats familiar with the intricate detail and complexity of the treaty to spend enormous amounts of time in meetings which precluded the active participation of any responsible Assistant Secretary of State.

There were two general points of view which emerged in the review process. The first was advocated by the Deputy Assistant Secretary of State for Ocean and Fisheries Affairs, the most senior official responsible for the day-to-day conduct of the review. In essence, this point of view held that the treaty was flawed because it created adverse precedents for other negotiations on economic issues between developed and developing nations—the North-South dialogue—subjugated American industry to an international regulatory and management system, and was incompatible with President Reagan's apparent desire to return the United States to a period of power and influence in world affairs in which its policies would simply be enunciated rather than sold to others through a process of diplomacy and negotiation. I think it is also fair to say that proponents of this view did not believe that it was possible for any American to participate actively in the negotiation of this treaty without being seduced by it and, therefore, they saw great risks in any return to the bargaining table even for the purpose of making a best effort. These views were also strongly supported by staff on the domestic side of the White House, the Interior Department and some civilians in the defense establishment as well as some members of Congress.

The opposite point of view was represented by other agencies and participants in the process and by this author, who at the time was serving as a contract adviser to the Assistant Secretary of State, James L. Malone. That point of view can best be summarized as a recognition that the treaty in its present form

was unratifiable, accompanied by belief that the treaty could be renegotiated and that significant improvements could be made to it. From the perspective of those who held this point of view, there seemed no harm in trying to improve the treaty in fundamental ways because ultimately a good treaty which provided universal recognition of mining claims as well as universal acceptance of countless other important legal principles contained in the treaty would be a worthwhile goal. Moreover, the proponents of this viewpoint felt that U.S. interests could not be compromised merely by returning to the negotiations since the President ultimately would have to decide whether the United States should sign the resulting treaty.

Another point was made with respect to resuming negotiations: responsible American negotiators, acting under strict instructions, would not be lured into accepting a treaty which was contrary to the overall national interest. American negotiators at a multilateral conference generally do not operate in a vacuum or in secret. All of their tactical and strategic movements are discussed and debated on a daily basis with the wide array of U.S. interests represented on the U.S. delegation. Opportunities for the loyal opposition to change the direction of the negotiations are legion. Therefore, the risk perceived by some of compromising national interests through an effort to renegotiate did not seem sufficiently realistic to sacrifice the opportunity to improve the treaty.

The latter view prevailed, and the President of the United States decided on January 29, 1982, that the United States would return to the negotiations and would seek six broad objectives. These objectives were then supplemented by detailed instructions which were not sent to the President for approval but were negotiated among the various agencies of government which had participated in the initial adversarial process. Perhaps inevitably, the development of detailed instructions became a surrogate forum for rejoining the original issue which had already been decided by the President. The basic dispute over the instructions was whether to make them so strict and so confining as to produce a situation in which it would be impossible for American negotiators to satisfy them.

The instructions, when finally issued on March 8, long after the preliminary negotiations in New York had begun, reflected an interpretation of the President's objectives which was considerably more constrained than the objectives themselves. It is for this

[1] [To come]

reason that many delegations at the Conference frequently found it difficult to understand the U.S. negotiating posture, since the President's public statement appeared to a reasonable reader to permit a far more flexible stance by the United States than was actually being presented. Other delegations did not understand that the U.S. delegation was operating under instructions containing a restrictive interpretation of the President's objectives and was under pressure to adhere to those instructions as the sole guidance for interpreting the President's objectives.

One final point should be made in connection with the policy review process which turned out to be of utmost importance in the end. Since one of the principal U.S. objectives was to secure access to the raw materials of the deep seabed, the question necessarily arose whether there was any alternative to a comprehensive treaty on the law of the sea which would adequately protect claimed mining rights so as to provide a stable basis for major financial commitments in support of deep seabed mining.

The proponents of withdrawal from the Conference argued forcefully that an alternative mini-treaty regime among the genuinely concerned industrialized countries—outside the framework of the comprehensive treaty—would be an adequate basis for investment even if the treaty on the law of the sea were adopted by a very large number of countries and entered into force. Those who favored returning to the bargaining table were divided on this issue. Some felt that under certain conditions a viable alternative mini-treaty regime could be established, but that the United States should nevertheless seek the comprehensive treaty solution. Others felt that an alternative mini-treaty regime would be resisted by our Western allies in the face of a treaty adopted by the vast majority of nations including virtually all of the developing countries. Moreover, if a comprehensive treaty on the law of the sea entered into force for 100 nations or more, it was felt that ultimately mining companies would choose that regime—which would give the best color of title to their mining claims—rather than a separate mini-treaty regime.

Because views were divided among those who supported returning to the bargaining table, doubts about the realistic prospects for establishing an alternative mini-treaty were not forcefully put forward at the highest levels of government although the issue appeared in the relevant documents as one on which there was disagreement. Related arguments were presented to support the particular point of view of the proponents of a particular option. As a result, to the best of my knowledge, no authoritative state-

ment was ever made to the President and his close advisors that if they wished to preserve direct access to strategic raw materials through American flag operations there could in the end be no viable alternative to an improved comprehensive treaty on the law of the sea.

Accordingly, when a final decision was made and detailed instructions for the delegation were negotiated, there was an assumption in the Administration that if the United States adopted a tough uncompromising stance and as a result lost the opportunity to improve the treaty, it could afford to stay out of the treaty because there was a viable alternative—a separate mini-treaty with our allies. This assumption may have been the Achilles heel of the U.S. strategy for the last session of the Law of the Sea Conference. (Moreover, the strong U.S. public posture to push ahead with mini-treaty negotiations even before the Law of the Sea Conference began in March was a major factor in convincing the developing countries that the United States did not have a serious interest in the comprehensive treaty and thus worsened the chances for successfully negotiating the President's objectives.)

One further comment should be made in connection with the policy review process. The Department of Defense had in previous Administrations been a strong unyielding supporter of the successful conclusion of the treaty. The Department of Defense had always felt that the stability of international law which would accrue from this treaty, which contains many provisions favorable to the mobility of its air and sea forces, was a significant national security benefit when compared with the uncertainty of potential arguments with coastal states which might exist in the absence of this treaty.

During the Reagan Administration, however, two things changed in the Department of Defense. First, there was a much greater emphasis, particularly on the civilian side of the Defense Department, on the importance of American access to strategic raw materials as a national security interest and, second, there was a belief that if the treaty finally entered into force without U.S. participation, most of those provisions which were favorable to the security of the United States would be accepted as customary international law and the treaty rights would be available to all states whether or not they became parties to the treaty. In combination, these two views produced significantly less enthusiasm for the treaty within the Defense Department than had been the case before. This shift markedly changed the balance of power in the intragovernmental adversarial process. The assumption

that the treaty provisions would become customary international law was never seriously questioned—it was taken for granted.

III

Out of respect for our power and influence, the world waited for the U.S. decision. The Law of the Sea Conference went into neutral gear, avoiding final adoption of the text which had been virtually completed in 1980 with apparent U.S. agreement. By the time President Reagan announced on January 29 that the United States would return to the negotiating table, U.S. negotiating leverage was substantial.

When the Conference resumed in March, the United States had its golden opportunity. The rest of the world was ready, willing and anxious to reshape important aspects of the treaty to attract U.S. support. Yet at the end, as has already been mentioned, the treaty was adopted over U.S. objective. The Soviet bloc abstention was prompted by a minor point, and the Soviets are likely eventually to sign the treaty. Two of America's closest allies, Japan and France, despite high-level pleas for solidarity, voted in favor—a startling and potentially powerful signal about Japanese postwar foreign policy development. West Germany, Britain and a handful of other Western allies abstained in support of the United States—but may well sign the treaty with or without the United States, for reasons which will be discussed later.

As described above, the United States returned to the bargaining table with instructions to fix every important defect in the seabed mining provisions—in short to convert the treaty into a "frontier mining code" in which the first company to stake a claim owns the resources and is not subjected to regulation or management except for the payment of taxes. This view was combined with a demand for overwhelming voting power for the United States and its closest allies in the proposed International Seabed Authority.

All of the improvements we sought were desirable and important. Some of them were fundamental to making the treaty commercially more workable. But the primary U.S. objective, in fact, was the eradication of ideological impurity. As a result, when the time came for compromise, the United States did not make ideological concessions to the Third World in exchange for pragmatic improvements. The Western allies maintained solidarity with the United States throughout the negotations. In doing so, our allies, who in varying degrees, share our ideological views—but not our willingness to sacrifice concrete accomplishments for

them—were deterred from negotiating more modest improvements on their own behalf.

Our strongest stance on every issue (combined with public posturing in favor of an urgent separate mini-treaty) persuaded the bulk of Conference participants that the U.S. appetite was too great—no improvements were likely to satisfy us that could also be swallowed by the Third World. Many hoped up until the final hours that the United States would moderate its position on other issues, so as to create a fruitful negotiating climate. We did finally, but our concessions were small when measured against our remaining demands. Indeed, even the few concessions we offered brought cries of sellout from some in Congress, the mining industry, and elements of the Executive Branch.

The day-to-day negotiating process was monitored both within the delegation and back in Washington so closely by individuals who had supported the option of withdrawal from the Conference, that any negotiating move made by the American delegation was interpreted as a giant step down the slippery slope to compromise of principle and disaster. One of the individuals who held this view even believed that efforts at compromise which might ultimately fail and cause the United States to stay outside the treaty were in and of themselves dangerous precedents for other global negotiations. This particular individual alerted members of private industry (who also shared this perspective) to all U.S. delegation activities including new or contemplated U.S. proposals. Thus for every effort by the American delegation to find an accommodation that would help satisfy the President's objectives, there was a countereffort launched in Washington by those who had lost the battle to withdraw from the negotiations. These countermoves were executed as personal attacks on members of the American delegation, and as attacks on the process of negotiation itself, and were frequently marked by distortion and falsehood. The American delegation, meanwhile, was engaged in round-the-clock negotiations in New York and could not devote substantial attention to defending and explaining its actions in the face of increasing opposition in Washington which succeeded in obtaining a hearing at very high levels in the White House.

The American delegation was, therefore, held in check and did not make serious compromise proppsals on many issues where genuine compromise might have produced far-reaching improvements in the treaty text. I would cite two examples: if the United States had not demanded virtually autocratic ruling powers over the Seabed Authority and had not sought the total elimination of

the so-called production ceiling (which in real economic terms is a cosmetic provision to reassure existing land producers of seabed metals that their production will not be wiped out by future seabed production), it would have been possible, perhaps easy, to have obtained major improvements in the practical effects of, and the principles contained in, the technology transfer provisions and the provisions which permit amendments to the treaty (after 20 years) without U.S. consent. When the U.S. position did reflect some modest relaxation in some of the aforementioned areas, the negotiators came very close to solutions for these latter two problems.

It should be borne in mind that those who did not want the United States to participate in the Conference may also have had as their underlying tactical objective a desire to ensure that the treaty was not improved, so as to make it more difficult for our Western allies to join the treaty and concomitantly to make it easier when the conference ended in failure to obtain rapid agreement to an alternate mini-treaty regime.

The developing countries, however, sensed that these dynamics might be in process and virtually demanded an opportunity to negotiate the one issue on which they were prepared to make a concession so significant as to lure our allies into the treaty. Paralyzed by the rigidity of its instructions, the American Delegation had no choice but to play into the hands of the Third World strategy and negotiate the issue which the developing countries insisted be taken up first—the recognition in the seabed—"grandfather rights."

This was so because the issue of grandfather rights was considered by the entire Conference to be "outstanding" in that it had never been part of the 1980 package negotiated by Ambassador Elliot Richardson. Moreover, it was an issue on which significant progress could be made, while the issues the United States wished to renegotiate were among the most difficult. The developing countries hoped that if they made meaningful concessions on grandfather rights the U.S. mining industry would be pacified and would reduce its pressure on the U.S. government. In turn, they assumed the United States would reduce its demands.

The negotiations on the issue of grandfather rights resulted in a final resolution of the Conference which successfully met some of our fundamental objectives—but more importantly may well have met the most central objective held by our closest allies. Under the resolution, four existing mining consortia (each of which includes or is controlled by U.S. companies) plus projects

sponsored by the governments of Japan, France, the U.S.S.R. and India, would have guaranteed automatic access to the strategic raw materials of the seabed for the first generation of seabed mining. Altogether, ten seabed mining entities are entitled to all of the mineral production likely or possible from the seabed for the next 30 to 50 years: metal market projections indicate that demand for manganese, copper, cobalt and nickel from the seabed is unlikely to reach, much less exceed, the production capacity of these grandfathered miners during that period.

Thus—with the notable exceptions of mandatory technology transfer and the procedure for amending the treaty—the offensive ideological provisions of the treaty would not effectively apply before the middle of the twenty-first century. By that time there would have been a thorough treaty review and an opportunity to renegotiate.

Because the issue of grandfather rights dominated the negotiations, and because the negotiations were against a deadline of April 30 (a consensus decision accepted by the Reagan Administration in 1981), opportunities to deal with issues other than grandfather rights did not arise until the final ten days of the session. Moreover, the procedure for the final session of the Conference was organized in such a way that between April 13 and April 30 the only amendments to the treaty which would have any chance of inclusion in the final draft would be those put forward by the President of the Conference, Ambassador T.T.B. Koh of Singapore, if he were satisfied that such amendments adequately enhanced the prospects for consensus.

Thus for a little over two weeks the president of the Conference held enormous power over the final treaty text. At the same time, it was his responsibility, and to his credit he took it seriously, to introduce amendments to the treaty only if they enhanced the prospects for consensus. He organized small groups for rapid, effective negotiations on other issues.

However, the atmosphere in this final stage was undoubtedly affected by an important exchange earlier in the Conference. Ambassador Koh had hoped that a set of proposed amendments put forward very early in the negotiations by a group of so-called "good samaritans"[2] would bridge the gap between the developing countries, on the one hand, and the United States and its Western allies on the other. He wanted both sides to accept these proposals—or at least not to reject them—so that at the end of the Conference he would be in a position to propose them for incorporation into

[2] Canada, Australia, New Zealand, Norway, Sweden, Denmark, Finland, Iceland, The Netherlands, Ireland, Switzerland and Austria.

the final treaty text. For the United States, these papers moved significantly toward meeting the President's publicly announced objectives, although they fell far short of the American delegation's negotiations instructions. Verbatim acceptance of the good samaritan papers would have produced a treaty which on a fair reading of the President's objectives of January 29 would still have fallen short.

The crucial question was whether the United States was willing to send a strong signal that by and large these papers were on the right track, and with further negotiations and additional amendments might be acceptable. While the United States did not intend to reject these proposals out of hand, it stated its difficulties with these proposals in such strong terms as to lead Conference leaders to conclude that they had been rejected. In the vocabulatory of diplomats, strong reservations to a proposal are generally considered to be a rejection. Thus, at a crucial halfway point in the Conference there may have been a tragic failure of communication.

After the United States apparently rejected the good samaritan papers as a basis for negotiations, the remaining weeks of negotiation were carried out by the president of the Conference in a desultory and pessimistic atmosphere, even though time permitted serious negotiation of the main issues of concern to the United States. Although the Group of 77 was maintaining a very tough stance in response to the U.S. stance, the job could have been done. But in an atmosphere where hope and optimism were lacking and U.S. commitment to the negotiation was doubted, it became virtually impossible for the president to pull a rabbit out of a hat.

He did, nevertheless, finally make a number of additional improvements to the treaty as a result of direct negotiations between the Western countries and the developing countries. For example, the United States is guaranteed a seat on the Executive Council of the new global institution, the Seabed Authority (assuming, of course, that the United States joins the treaty). The provisions for amending the seabed mining provisions of the treaty have been improved. The contract approval system for mining entities has less potential for abuse and discretion. The policy orientation of the Seabed Authority is slightly more favorable to mineral production, and the Seabed Authority must adopt rules and regulations for newly discovered seabed minerals once a nation capable of exploiting them makes a request—thus avoiding one of the fatal flaws in the previous draft treaty, a moratorium on these other minerals.

These achievements were modest, however, and did not rectify fundamental inequities and adverse precedents which the Administration quite properly opposed. Nevertheless, they may be sufficient to make the treaty very attractive to other Western industrialized countries who, while sharing our ideological views, are more interested in secure access to strategic raw materials and influence in global economic decision-making. Under the treaty, they will be guaranteed mineral access for a substantial period into the future and will play a large role in shaping the rules for seabed mining.

IV

Perhaps the greatest irony for the United States is that, as a result of one further change in the last stages of the Conference, the treaty now authorizes, even commands, what the Third World had long vehemently opposed—a mini-treaty among those countries who wish immediately to resolve overlapping mine site claims and obtain global approval for their legal rights. But there is a catch. To obtain global approval, they must sign the treaty.

If ~~the~~ nations fail to sign, and instead sign an *alternative* mini-treaty regime, they will provoke global disapproval of the lawfulness of their mining claims. The President of the Conference has vowed to challenge any alternative mini-treaty before the U. N. General Assembly and to seek an opinion of the International Court of Justice. The resulting protracted litigation would have a chilling effect on seabed mineral investment.

For this reason among others, in my judgment Japan, France, West Germany, Britain and most other potential seabed mining nations ultimately will sign the Law of the Sea Treaty and a mini-treaty *among themselves* which will dovetail with the treaty. In any such mini-treaty, our allies will surely make certain that any such agreement preserves their option to sign the law of the sea treaty. They will do so because the Law of the Sea Treaty creates unchallengeable rights, superior to those created by a mini-treaty. Absent U. S. ability to persuade our allies to sign a permanent mini-treaty as an alternative to the treaty, the United States ultimately will be abandoned by its allies, who would be prohibited from recognizing U. S. mine site claims once they have signed the treaty.[3]

This point is crucial, because I believe the U.S. decision not to

[3] Article 137, paragraph 3, of the treaty prohibits states from recognizing seabed mining claims which are not derived from the treaty and its rules and regulations. Under customary international law principles of treaty interpretation, a state which signs a treaty is bound not to act incompatibly with it pending its ratification and entry into force.

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compromise ideological issues was founded on an assumption that after the Conference ended, the Western industrialized countries would ignore the law of the sea treaty and set up an alternate mini-treaty. This approach presumably assumed that a mini-treaty would include all potential seabed mining countries and therefore would provide sufficient legal security to attract the billions of dollars of private capital necessary to set up commercial mining operations. I suspect that if William Safire had understood that this outcome was, at best, improbable and unworkable, he would not have suggested in *The New York Times* on April 9, 1982, that the United States should shelve the treaty negotiations. I believe that if President Reagan understood the realistic prospects for an alternative mini-treaty regime, he too would have had second thoughts about the pursuit of principle over pragmatism.

U.S. policy makers may have also made another assumption which could prove false: that the United States could stay outside the treaty but claim and enjoy its numerous beneficial provisions (which establish rights to the 200-mile economic zone, guarantee to every coastal state broad jurisdiction over its continental shelf, freedom of military and commercial navigation within the economic zone and through and over international straits)[4] and that these claimed benefits would be accepted by other nations because the treaty reflects custom—an accepted way of formulating international law.

I do not believe that serious consideration was given to the possibility that the contrary argument could be made—that the Law of the Sea Treaty only creates rights for those who are parties to it and who assume the treaty's obligations. Let us look at just a few examples.

The Strait of Gibraltar is critical to the passage of surface and submerged vessels and to overflight by aircraft of the United States. Spain, which is the relevant coastal sovereign, might argue that the 12-mile territorial sea has become part of customary law (a view very widely held in the world community). At the same time, Spain might argue that the regime of "transit passage"

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[4] In addition, coastal state rights to control offshore pollution as well as shipping state rights within coastal waters are covered by the treaty. Similarly the rights of marine scientific researchers and coastal states are not set forth in the treaty. Space does not permit an exhaustive listing of the hundreds of legal rights and obligations which create the overall balance of sea law in the treaty. Suffice it to say that virtually all uses of the oceans are affected by the legal rights and obligations set out therein.

Editor's Note: The many issues considered by the Third Law of the Sea Conference have been the subject of a number of articles in *Foreign Affairs* from varied standpoints. See, most recently, Elliot L. Richardson, "Power, Mobility and the Law of the Sea," Spring 1980, pp. 902-919; Richard G. Darman, "The Law of the Sea: Rethinking U.S. Interests," January 1978, pp. 373–395; Jonathan I. Charney, "Law of the Sea: Breaking the Deadlock," April 1977, pp. 598–627; John Temple Swing, "Who Will Own The Oceans?", April 1976, pp. 527–546.

through international straits is new to international law—that it is found only in the Law of the Sea Treaty and is thus a contract among the parties to it. Thus Spain would argue that the old rule permitting only "innocent passage" in the territorial sea would apply—which prohibits submerged navigation. This is not the time or place to attempt to prejudge the outcome of such an argument. What is dangerous for the United States is the existence of the argument and the potential uncertainty of its military rights in narrow seas during times of crisis.

A second example could be that coastal states may choose to impose stricter regulations on oil tankers flying a U.S. flag, arguing that they have a right to discriminate against non-parties to the treaty. Third, in a Middle East crisis Arab countries might be tempted to seize on United States non-participation in the treaty as an excuse to attempt to limit our activities within their economic zones.

Thus, for those nations who eschew the treaty obligations, while treaty rights may be claimed as a matter of customary law, they may also be contested (even by obstructive action) and in any case challenged in protracted litigation before the International Court of Justice. That Court may one day resolve America's rights to freedom of navigation, with the possibility that the successful ten-year negotiating effort to gain these rights could conceivably be lost.

V

One final point remains. The totality of the seabed mining provisions of the treaty are hard to defend on the merits. I am a conservative who sympathizes with the Reagan Administration's criticisms of the Law of the Sea Treaty. Presumably that is why the Reagan Administration asked me to join the effort at renegotiation. I am certain that the final treaty would have better satisfied U.S. interests had the Administration been less ideologically rigid in its approach. I also would be the first to acknowledge that the best that could have been done would have involved important compromises of principle.

But the dilemma for the United States now goes far beyond the specific flaws in this treaty. In time—probably sooner rather than later—our allies, the Soviet bloc and the Third World will sign and ratify the treaty. They see a long-term future in the treaty, and they will want to be part of it. They will want to protect "grandfather rights" for their companies, secure international approval for broad jurisdiction over their continental ~~approval~~ shelves, have a voice in organizing, staffing and drafting the rules

of the new Seabed Authority and lay to rest numerous other potential disputes about varying uses of ocean space and resources.

If the Western industrialized powers, minus the United States, join the Soviet bloc and the Third World, they will create an historic global organization—one which for the first time regulates, manages and produces globally shared resources. One day this institution could use its taxing power to become self-financing. Should all this occur without American influence, participation and leadership, our nation will suffer a much more serious adverse precedent than any of the adverse precedents we fought against in the treaty negotiation itself. We will stand as the emperor without clothes—for the entire world will see that it can do amazing and stupendous things without American money, leadership or technology. If the United States is not part of the treaty system, American companies will have to go to other countries to be able to conduct business in the seabed. As a result, the United States will lose direct access to strategic raw materials from the seabed, a goal it has sought consistently throughout the ten-year law of the sea negotiations.

In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war.

VI

If one accepts the thesis that our Western allies will join the Law of the Sea Treaty and refuse to create a mini-treaty with us; that our companies will flee to other flags so as to operate under the treaty and gain universal acceptance of their mining claims; and that virtually important freedoms of the seas will now be subject to legal argument and potentially will be decided by the International Court of Justice adversely to our interests, then the United States is compelled to examine any remaining option to improve the treaty and sign it, and should not simply walk away from the treaty in the misguided hope that it will evaporate.

In September 1982 the Law of the Sea Conference will convene in New York to approve the final recommendations of its drafting committee. If the United States were willing to mount a major diplomatic initiative between now and then to obtain consensus approval for a few amendments relating to discrete issues—such as the process for amending the treaty, the mandatory transfer of private technology, and clearer provisions for the separation of powers between the one-nation, one vote Assembly and the Executive Council (on which we now have a guaranteed seat)—I

believe there is a chance for success, and I also believe there would be a good chance to persuade the Senate to advise and consent to the treaty.

This approach is conditioned on the proposition that during the same time period the wider business community—not just a handful of mining companies, but scores of American corporations with far-flung global interests and a direct concern with the risks presented by isolationism and worsening U.S. relations with the Third World—will enter this policy debate and make their views known forcefully.

In a recent appearance before the Association of the Bar of the City of New York, the President of the Conference, in response to a question whether additional amendments would be admitted in September, replied that he was a "servant of the Conference" and would, of course, not impede a consensus decision to make further amendments.

In any event the United States should avoid premature breaking of ties with the Conference. We should attend the drafting committee meeting this summer (where incidentally the United States serves as Chairman of the English Language Group), we should attend the signing session in Caracas in December 1982, and we should sign the final act of the Conference, a step which has no legal significance except that it gives us the right to attend the Preparatory Commission as observers when it writes the rules and regulations of the new global Seabed Authority.

If, finally, the President decides that the United States should not sign the treaty after making one last effort to improve those of its provisions which are true impediments to its ratification—so be it. But my prediction is that eventually a future U.S. President will sign it, amd its content will be worse than if we had compromised a little now on principle to gain additional benefits.

If my political analysis is correct, this or some future Administration will come to understand that the costs of isolation are far higher than the costs of accepting some of the rhetoric and principles of the North-South dialogue. And when the United States does eventually join, the rules of the game will already be set and our industrial competitors will be operating in the seabed and will have gained by then major political and economic advantages in the work of the new institution.

Our senior foreign policy makers should understand that once leadership is abdicated and the world finds that it can proceed without us, it will not be easy for the United States to reclaim its influence.